STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 13 AP 299 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

MICAH J. SNYDER,

Defendant-Respondent.

SUPPLEMENTAL BRIEF OF DEFENDANT-RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT
FOR COLUMBIA COUNTY, BRANCH I,
THE HONORABLE DANIEL S. GEORGE PRESIDING.

Respectfully submitted,

MICAH J. SNYDER,
Defendant-Respondent

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BACKGROUND

Last month, the Wisconsin Supreme Court issued its decision in *Cnty. of Grant v. Vogt*, 850 N.W.2d 253; 2014 WI 76 (2014). In that case, a sheriff's deputy approached the defendant's vehicle on foot and from behind. He activated neither his squad car's spotlight nor its emergency lights, and knocked on the defendant's window. *Vogt*, 2014 WI 76 at ¶ 4. The trial court denied the defendant's motion to suppress on the grounds that no seizure occurred.

This Court reversed the Grant County Circuit Court, concluding that "when a uniformed officer approaches a vehicle at night and directs the driver to roll down his or her window, a reasonable driver would not feel free to ignore the officer." *Cnty. of Grant v. Vogt*, No. 2012AP1812, 2013 WI App 55, ¶ 13 (Ct. App. March 24, 2013) (unpublished but cited for persuasive authority pursuant to Wis. Stat. § 809.23(3)).

The Wisconsin Supreme Court reversed, acknowledging that *Vogt* was a "close case" and narrowly holding only that "a law enforcement officer's *knock on a car window* does not by itself constitute a show of authority sufficient to give rise to the belief in a reasonable person that the person is not free to leave." 2014 WI 76 at ¶ 54 (emphasis added). Thus, Vogt was not seized.

ARGUMENT

The facts of this case differ significantly from those in *Vogt*. Therefore, even in light of the *Vogt* case, this Court should affirm the trial court's order granting Respondent's motion to suppress. Trooper Larson seized Mr. Snyder by positioning his squad car directly in front of Mr. Snyder's vehicle, partially blocking the parking lot's only exit, and then approaching on foot before requiring Snyder to respond to inquiries.

I. TROOPER LARSON SEIZED MR. SNYDER WHEN HE POSITIONED HIS SQUAD CAR DIRECTLY IN FRONT OF MR. SNYDER'S VEHICLE, PARTIALLY BLOCKING THE PARKING LOT'S ONLY EXIT, AND APPROACHED ON FOOT BEFORE REQUIRING SNYDER TO RESPOND TO INQUIRIES.

The facts of *Vogt* differ significantly from those at hand. Granted, both deal with a citizen, a police officer, and a parking lot. *Vogt*, 2014 WI 76 at ¶ 4; (R. 28, p. 4). However, several material facts in the present case are absent from *Vogt*. Complete examination of these facts makes clear that no reasonable person in Mr. Snyder's position would have felt at liberty to leave. Therefore, this Court should affirm the trial court's order granting Respondent's motion to suppress.

A. Standard of review.

Whether someone has been seized presents a two-part standard of review. *State v. Williams*, 255 Wis.2d 1, 10, 646 N.W.2d 834, 838 (2002). The application of constitutional principles to the facts will be subjected to *de novo* review. *Williams*, 646 N.W.2d at 838. However, appellate courts defer to the circuit court's findings of fact unless they are clearly erroneous. *Id.* The court on appeal will also assume when a finding is not made on an issue which appears from the record to exist, that it was determined in favor of or in support of the judgment. *State v. Berggren*, 320 Wis. 2d 209, 227, 769 N.W.2d 110, 118 (Ct. App. 2009).

B. Trooper Larson squared off his vehicle against Mr. Snyder's.

In *Vogt*, the deputy assumed a nonconfrontational position behind the defendant's vehicle, slightly off to the driver's side. *Vogt*, 2014 WI 76 at ¶ 6. Trooper Larson, however, positioned his fully marked Wisconsin State Patrol squad car "headlight to headlight" with Mr. Snyder's silver Cadillac. (R. 28, pp. 4; 12.) This created a more adversarial context for any conversation that might then occur; Trooper Larson therefore seized Mr. Snyder. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (a seizure occurs "if, in view

of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.").

C. Trooper Larson left Mr. Snyder with only one exit route *around* a fully marked Wisconsin State Patrol squad car. No reasonable person would dare attempt such a maneuver; therefore, Trooper Larson seized Mr. Snyder.

The circuit court found that Trooper Larson "pulled up in such a fashion that for the defendant to have left, he would have had to make a significant effort to go around the vehicle of the officer." (R. 29, p. 6.) This is not a legal conclusion; rather, it is a finding of fact based on the testimony at the suppression hearing. This Court will only disturb such factual findings if clearly erroneous. *Williams*, 646 N.W.2d at 838. The officer's proximity, position, and approach each justify this finding.

The deputy in *Vogt* testified that the defendant "might have had 50 feet in front of him in which he could have pulled forward and turned around [and left the area]." 2014 WI 76 at ¶ 42. Furthermore, the trial court didn't find that the officer was preventing Vogt from leaving as the trial court did in the instant case. Trooper Larson, on the other hand, approached "headlight to headlight" and left only one or two car lengths between himself and Mr. Snyder. (R. 28, p. 5.)

But the fact that Trooper Larson's squad car served as a physical obstacle is only part of what made Mr. Snyder reasonably feel that he was not free to leave. The defendant in *Vogt* would have merely had to drive *away* from the sheriff's deputy parked behind him. However, Mr. Snyder would have had to maneuver *around* a fully marked Wisconsin State Patrol squad car. There is an appreciable social significance to such an action and no reasonable person would dare attempt it.[1]

D. The record is vague on the character of Trooper Larson's first contact with Mr. Snyder; therefore, these facts should be construed in a light most favorable to the circuit court's judgment.

The record is vague as to the character of Trooper Larson's initial contact with Mr. Snyder. Even according to the appellant's statement of the facts, we know only that Trooper Larson pulled in front of Mr. Snyder and walked up to the vehicle. There is scant testimony illustrating the character of the subsequent encounter,

[1] Several cases from other jurisdictions deal with a situation similar to the one in *Vogt*, where a police officer stops *behind* a parked vehicle and approaches on. The holdings in these cases hinged on the effect of the squad car's position on the defendant's ability to drive away. *See, e.g., United States v. Griffith*, 533 F.3d 979 (8th Cir. 2008) ("[There was no seizure because] officers did not block the parking lot exit or impede [the driver's] ability to drive away."); *United States v. Taylor*, 511 F.3d 87 (1st Cir. 2007) (declining to find that a seizure occurred because the defendant "could have driven forward and turned left to exit the parking lot."); *State v. Wilkes*, 756 N.W.2d 838 (Iowa 2008) (no seizure where position of police car was such that the defendant's ability to drive away was "not substantially impaired.").

which could impact this Court's legal conclusions on whether and when a seizure occurred. The State's evidence was unclear. It is most reasonable to assume the window was down at Trooper Larson's command, as there was a very detailed conversation during which Trooper Larson claimed to smell intoxicants. (R. 28, p. 14.) He then demanded an explanation from Snyder as to what he was doing there. (R. 28, p. 8.) The facts absent from the record on the character of the encounter after Trooper Larson's approach must be construed in a light most favorable to the trial court's order granting Respondent's motion to suppress. *Berggren*, 769 N.W.2d at 118.

However, the circuit court found that "given the positioning of the officer's vehicle, the marked squad status, the uniformed officer approaching the defendant parked in this position, there is absolutely no question in the court's opinion that the officer was intending to exercise some degree of control over the defendant and had effectuated a seizure." (R. 29, p. 6.) The word "intending" does not render this finding erroneous or irrelevant. The lower court understood the objective nature of the *Mendenhall-Royer* test and even properly sustained the State's objection when Respondent's attorney asked Trooper Larson what he would have done had Mr. Snyder driven away. (R. 28, p. 13.) But to the extent the court's

finding explains the tenor of the police contact, it is relevant. Based on the facts discussed above, the trial court merely found that a trooper who intends to control the scene will be acting in a way to ensure compliance. This differs from the trial court in Vogt, which found that the officer's testimony that he would have not stopped him if Vogt drove away showed it was not a situation were Vogt was being commanded in any way. Any officer's subjective intent is likely to be manifested in his or her actions.

Moreover, no testimony establishes whether Mr. Snyder's car window was down at Trooper Larson's command, or if it was down the entire time. When asked whether the window was already down, Trooper Larson responded, "I believe it was, but I'm not 100% sure." (R. 28, p. 7.) Again, since the trial court made no findings on this material fact, it should be construed on appeal in a light most favorable to the respondent. *Berggren*, 769 N.W.2d at 118.

CONCLUSION

Trooper Larson seized Mr. Snyder by (1) positioning his squad car directly in front of Mr. Snyder's vehicle, so that Mr. Snyder "would have had to make a significant effort to go around the vehicle of the officer," and then (2) proceeding to make inquiries of Snyder. (R. 29, p. 6.) Each of the facts above constitutes a material departure from, and a greater show of authority than the one in *Vogt*, and thus weighs in favor of this Court concluding that a seizure occurred. *See United States v. Mendenhall*, 446 U.S. 544, 553 (1980) ("We adhere do the view that a person is 'seized' only when, by means of physical force *or a show of authority*, his freedom of movement is restrained.") (emphasis added); *see also Vogt*, 2014 WI 76 at ¶ 54 ("[W]e acknowledge that this is a close case."). Therefore, Respondent respectfully asks this Court to affirm the trial court's order granting his motion to suppress.

Dated at Madison, Wisconsin, August 15, 2014.

Respectfully submitted,

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Defendant-Respondent

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,226 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: August 15, 2014.

Signed,

_____

TRACEY A. WOOD
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